Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-618

CHARLES F. ATWELL,

Petitioner-Defendant,

v

FRANK J. KELLEY,

Respondent-Plaintiff.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WAS PETITIONER-DEFENDANT PLACED TWICE IN JEOPARDY BY THE ACTION OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN TO ENJOIN PETITIONER-DEFENDANT'S DECEPTIVE ADVERTISING?

II.

HAS PETITIONER-DEFENDANT THROUGH HIS ADVERTISING HELD HIMSELF OUT TO THE GENERAL PUBLIC AS A PHYSICAL THERAPIST WITHOUT BEING LICENSED BY THE STATE OF MICHIGAN TO PRACTICE PHYSICAL THERAPY?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions are adequately set forth in the Petition.

MICHIGAN COMPILED LAWS

The statutes involved are adequately set forth in the Petition. However, Respondent-Plaintiff makes the following additions:

14.102

Any action at law brought by the attorney general in the name of the state or of the people of the state, for

the use and benefit thereof, may be begun in the circuit court in and for the county of Ingham, and may be prosecuted to final judgment and satisfaction thereof, with like effect as though the cause of action arose in such county. In any such case process issued out of and under the seal of said court may be served anywhere within the state of Michigan.

338.156

The license provided for in this act shall entitle the holder thereof to practice chiropractic in the state of Michigan, and for the purpose of this act chiropractic is defined as "the locating of misaligned or displaced vertebrae of the human spine, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae and surrounding bones or tissues, for the restoration and maintenance of health." A licensed doctor of chiropractic under this act may use x-ray and such analytical instruments as are approved by the Michigan board of chiropractic examiners in the examination of patients solely for the purpose of locating misaligned or displaced vertebrae of the human spine and for the procedures preparatory thereto.

The terms "chiropractic", "doctor of chiropractic", "chiropractor" and "all licensed doctors of chiropractic" mean a practitioner of chiropractic as defined in this act.

445.803

In determining whether or not advertising is deceptive or misleading, there shall be taken into account, in addition to the above, the extent to which the advertising fails to reveal facts material in the light of representations made or suggested in a positive manner.

445.807

(1) The attorney general may maintain an action to enjoin a continuance of any act in violation of this act. If the court finds that the defendant is violating or has violated any of the provisions of this act, it shall enjoin him from a continuance thereof. It shall not be necessary that actual damages to any person be alleged or proved.

(2) No proceeding shall be instituted for an injunction unless the attorney general has notified the defendant of his intention to file such a proceeding unless the defendant ceases and desists or has taken positive action to cease and desist from continuing to act in violation of this act, which notice shall be given at least 48 hours previous to the filing of the action. No injunction shall issue if defendant has ceased or has taken positive action to cease and desist violating the provisions of this act, upon receipt of the notice.

STATEMENT OF THE CASE

Charles F. Atwell, D.C., hereinafter referred to as Petitioner-Defendant, is a duly licensed chiropractic physician under 1933 PA 145, as amended; MCLA 338.151 *et seq*; MSA 14.591 *et seq*. Frank J. Kelley, Respondent-Plaintiff, hereinafter referred to as Attorney General, is the Attorney General of the State of Michigan and as such, serves as the chief law enforcement officer of the state.

On February 19, 1971 the Attorney General pursuant to section 7(2) of 1966 PA 241, as amended; MCLA 445.801 *et seq;* MSA 19.853(1) *et seq*, hereinafter referred to as Deceptive Advertising Act, instituted an action in the Circuit Court for the County of Ingham, State of Michigan, to restrain

Petitioner-Defendant from holding himself out to the public as a physical therapist through the medium of advertising in the Yellow Pages directories in the Detroit metropolitan area. The offending ad was placed under the heading "Physical Therapists" and, as an example, reads as follows:

"Atwell Zone Physiotherapy
& Fx Massage System
15412 E. Warren, Detroit

Physical therapists
Massage
Chiropractic physicians."

Pursuant to an Order to Show Cause, preliminary injunctive relief was granted to the Attorney General on May 21, 1971.

Petitioner-Defendant thereafter on or about July 1, 1971 instituted an action in the United States District Court for the Eastern District of Michigan, Southern Division, against Frank J. Kelley, Attorney General, Gay S. Hardy, Assistant Attorney General, and Donald L. Reisig, Ingham County Circuit Judge, alleging these defendants under color of state law participated in a deprivation of Defendant-Appellant's federally guaranteed civil rights. This action was dismissed on October 19, 1971 by the Honorable Damon J. Keith.

Thereafter, Petitioner-Defendant took an appeal to the United States Court of Appeals for the Sixth Circuit resulting in affirmance of the District Court. Petitioner-Defendant's Petition for Writ of Certiorari to the United States Supreme Court was denied.

Subsequent to the resolution of the federal cases, the Attorney General moved for summary judgment in the original

Ingham Circuit case. On January 18, 1974 the order herein appealed from was entered which provides in pertinent part as follows:

> "IT IS FURTHER ORDERED that defendant, Charles F. Atwell, D.C., shall be and hereby is permanently restrained and enjoined from advertising by using in connection with his name the words or letters 'physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T.,' or any other letters, words or insignia indicating or implying that he is a physical therapist, or in any other way, orally, in print, by sign, directly or by implication, representing himself as a physical therapist, in publications, including the Yellow Pages issued by the Michigan Bell Telephone directory placed before the public."

Petitioner-Defendant then appealed the Circuit Court decision to the Michigan Court of Appeals. The Michigan Court of Appeals upheld the decision of the Circuit Court in favor of the Respondent-Plaintiff reported at 59 Mich App 219; NW2d ..... (1975). Subsequently, Petitioner-Defendant sought leave to appeal to the Michigan Supreme Court. Leave to appeal was denied by the Michigan Supreme Court on July 9, 1975 in case number 56800.

ARGUMENT

I.

PETITIONER-DEFENDANT WAS NOT PLACED TWICE IN JEOPARDY BY THE ACTION OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN TO ENJOIN PETITIONER-DEFENDANT'S DECEPTIVE ADVERTISING.

The Attorney General, pursuant to the authority of section 7(2) of the Deceptive Advertising Act, *supra*, served the required Cease and Desist Order upon Petitioner-Defendant. Subsequently, after Petitioner-Defendant's failure to take positive action pursuant to the Order, the Attorney General instituted proceedings in the Circuit Court for the County of Ingham, State of Michigan.

The Deceptive Advertising Act, *supra*, reads in pertinent part as follows:

> "It shall be unlawful for any person knowingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive or misleading; or to advertise the availability of goods, wares or merchandise so as to misrepresent or unreasonably overstate the available supply in relation to reasonably expectable public demand, unless the advertisement discloses a limitation of quantity." MCLA 445.801; MSA 19.853(1)

> "In determining whether or not advertising is deceptive or misleading, there shall be taken into account, in addition to the above, the extent to which the advertising fails to reveal facts material in the light of representations

made or suggested in a positive manner." MCLA 445.803; MSA 19.853(3)

"(1) The attorney general may maintain an action to enjoin a continuance of any act in violation of this act. If the court finds that the defendant is violating or has violated any of the provisions of this act, it shall enjoin him from a continuance thereof. It shall not be necessary that actual damages to any person be alleged or proved.

"(2) No proceeding shall be instituted for an injunction unless the attorney general has notified the defendant of his intention to file such a proceeding unless the defendant ceases and desists or has taken positive action to cease and desist from continuing to act in violation of this act, which notice shall be given at least 48 hours previous to the filing of the action. No injunction shall issue if defendant has ceased or has taken positive action to cease and desist violating the provisions of this act, upon receipt of the notice." MCLA 445.807; MSA 19.853(7)

Petitioner-Defendant's representations of being a physical therapist are untrue since he is not licensed as such. Petitioner-Defendant's advertising represents in a positive manner that he is a physical therapist and provides services clearly within the ambit of the practice of physical therapy; the ads do not disclose the license status of Petitioner-Defendant. Clearly, offering physical therapy (physiotherapy) services falls within those proscribed activities contained in section 15 of the Physical Therapy Act, 1965 PA 164, as amended; MCLA 338.321 *et seq;* MSA 14.715(1) *et seq.*

The purpose of the Deceptive Advertising Act, *supra,* is to protect the citizens of the State of Michigan from those who

would use the persuasive media of advertising to offer services they may or may not be legally able to offer.

Petitioner-Defendant is before this Court raising the argument of double jeopardy and submits to this Court what appears to be portions of prior briefs filed in the federal actions. Somehow, Petitioner-Defendant seems to be convinced that the injunctive action under the Deceptive Advertising Act, *supra,* is criminal in nature. Petitioner-Defendant must be contending that since in 1969 he received an order from the Circuit Court for the County of Wayne, State of Michigan, mandating Michigan Bell Telephone Company to place his ads, the Attorney General's action in the instant matter constitutes double jeopardy. It is clear that the constitutional doctrine prohibiting double jeopardy applies to criminal actions. Moreover, the order on which Petitioner-Defendant relies does not speak to the Attorney General or any state agency.

Petitioner-Defendant further claims that the Circuit Court for the County of Ingham, State of Michigan, lacked jurisdiction over him and that its judgment reverses the order of Thomas Roumell, Circuit Judge for the County of Wayne, State of Michigan.

The Attorney General is authorized by statute to institute actions in the Circuit Court for the County of Ingham, State of Michigan:

"Any action at law brought by the attorney general in the name of the state or of the people of the state, for the use and benefit thereof, may be begun in the circuit court in and for the county of Ingham, and may be prosecuted to final judgment and satisfaction thereof, with like effect as though the cause of action arose in such county. In any such case process issued out of and under the seal

of said court may be served anywhere within the state of Michigan." 1919 PA 232, § 2; MCLA 14.102; MSA 3.212

Petitioner-Defendant erroneously claims his actions against Michigan Bell Telephone Company preclude the Ingham County Circuit Court from preventing him from placing the ad.

Petitioner-Defendant's claim is specious and without merit. The circuit court order to which Petitioner-Defendant refers was a mandatory injunction issued by Judge Roumell, Wayne County Circuit Judge, directing the Defendant Michigan Bell Telephone Company to place the advertising of Charles F. Atwell, D.C. in the Detroit classified telephone directory under the heading "Physical Therapist." The State of Michigan was not a party to this suit and received no notice thereof prior to the issuance of the aforementioned mandatory injunction. Not being a party to the litigation, the state is not bound by the terms of Judge Roumell's order.

The Court's attention is respectfully directed to *Old Kent Bank & Trust Co* v *United States*, 362 F2d 444, 450 (1966), decided by the United States Court of Appeals, 6th Circuit, which stated:

> "The opinions of the Probate Courts and Circuit Courts of Michigan are not digested, published or made available to the bench and bar, *are binding only on the parties to the particular cases and do not constitute binding precedents in the other courts of Michigan. . . .*" (emphasis added)

See also *Dowell* v *Gardner*, 386 F2d 809, 810 (CA 6, 1967).

The Attorney General therefore submits as to this issue that Petitioner-Defendant is not entitled to the relief he seeks.

ARGUMENT

II.

PETITIONER-DEFENDANT THROUGH HIS ADVERTISING HAS HELD HIMSELF OUT TO THE GENERAL PUBLIC AS A "PHYSICAL THERAPIST" WITHOUT BEING LICENSED BY THE STATE OF MICHIGAN TO PRACTICE PHYSICAL THERAPY.

Petitioner-Defendant contends that the Attorney General's action pursuant to the Deceptive Advertising Act, *supra*, was unfounded. The Attorney General instituted an action in the Circuit Court for the County of Ingham, State of Michigan, to restrain Petitioner-Defendant from holding himself out to the public as a physical therapist through the medium of advertising in the Michigan Bell Telephone Yellow Pages directories in the Detroit metropolitan area. The offending ad was placed under the heading "Physical Therapists" and, as an example, reads as follows:

> "Atwell Zone Physiotherapy
> & Fx Massage System
> 15412 E. Warren, Detroit
>
> Physical therapists
> Massage
> Chiropractic physicians."

The Physical Therapy Act, *supra*, defines the practice as:

"Sec. 1. As used in this act:

"(a) 'Physical therapy' or 'physiotherapy' means the treatment of any bodily or mental disorder of any person,

> or the prevention of such disorder, by the use of the physical, chemical and other properties of heat or cold, air, light, water, electricity, sound, massage, mechanical devices and therapeutic exercise, including related rehabilitation procedures. The use of Roentgen rays and radium for diagnostic or therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term physical therapy or physiotherapy." MCLA 338.321; MSA 14.715(1)

The use of certain titles is proscribed by section 15 of the Physical Therapy Act, *supra*, which reads as follows:

> "A person who is not registered under this act as a physical therapist or whose registration has been suspended or revoked, or whose registration has lapsed and has not been renewed, who uses in connection with his name the words or letters physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T., or any other letters, words or insignia indicating or implying that he is a physical therapist, or who in any other way, orally, in print, by sign, directly or by implication, represents himself as a physical therapist, is guilty of a misdemeanor. The prosecuting attorney may petition the circuit court for an injunction prohibiting violations of this section. This section takes effect 1 year after the effective date of this act." MCLA 338.335; MSA 14.715(15)

A comparison of the proscribed terms and Petitioner-Defendant's advertising reproduced above indicates a holding out to the general public in clear violation of the statute.

It is the Attorney General's contention in order to protect the health, safety and welfare of the people of this state that

Petitioner-Defendant be enjoined against representing himself as a physical therapist when he is not licensed to practice that health care occupation, as is required under the law of the State of Michigan.

It has long been recognized that a state, under its police power, may regulate the practice of professional and auxiliary activities concerning the public health. The state in its sovereign capacity is vested within its police powers to conserve and protect the public health. The United States Supreme Court has recognized this principle on numerous occasions, upholding a state's exercise of its police power in regulating various health care professions and occupations. *Williamson* v *Lee Optical of Oklahoma*, 348 US 483; 99 L Ed 563; 75 S Ct 461 (1955). *North Dakota State Board of Pharmacy* v *Snyder's Drug Stores*, 414 US 156; 38 L Ed 2d 379; 94 S Ct 407 (1973). *Semler* v *Oregon State Board of Dental Examiners*, 294 US 608; 79 L Ed 1086, 1089; 55 S Ct 570 (1934):

> "The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. . . . The State may thus afford protection against ignorance, incapacity and imposition. . . . We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals . . . and that it may prohibit advertising that tends to mislead the public in this respect. . . ." (p 1089)

On the strength of the above authority, the legislature's

regulation of the occupation of physical therapy is clearly a valid exercise of the police power.

The scope of chiropractic practice as defined in 1933 PA 145, *supra*, is:

> "Sec. 6. . . . for the purpose of this act chiropractic is defined as 'the locating of misaligned or displaced vertebrae of the human spine, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae and surrounding bones or tissues, for the restoration and maintenance of health.' . . ." MCLA 338.156; MSA 14.596

While it is possible some procedures that may be within the scope of chiropractic practice are also within the practice of physical therapy, neither statute would allow Petitioner-Defendant to advertise and hold himself out as a physical therapist.

CONCLUSION

The Attorney General, invoking his statutorily granted authority, instituted an action for injunctive relief to prevent the proliferation of Petitioner-Defendant's deceptive and misleading advertising as a physical therapist. The Circuit Court of Ingham County perceptively saw the relatively simple issues involved and correctly issued the appropriate injunctive order, which does not prevent Petitioner-Defendant from plying those parts of his trade as a chiropractor that overlap with the function of a physical therapist. The prohibition is against the holding out of Petitioner-Defendant of himself as something he is not.

The public responding to Petitioner-Defendant's ads faces

a needless hazard; i.e., a registered physical therapist performs his function pursuant to prescription only and is subject to disciplinary action if he deviates from the prescribed course of treatment. An unknowing layman responding to Petitioner-Defendant's ad may not receive the prescribed course of treatment ordered by his health care practitioner since Petitioner-Defendant, as a chiropractor, may deem a course of treatment under his philosophical base more appropriate.

PRAYER

WHEREFORE, the Attorney General prays that Petitioner-Defendant's Writ for Certiorari be denied.

Respectfully submitted,

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